# आयकर अपीलीय अधिकरण, ए न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
**'A'** BENCH : CHENNAI

**श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं**
**श्री चंद्र पूजारी, लेखा सदस्य के समक्ष।**
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**]**

आयकर अपील सं./I.T.A.Nos. 374/2004, 529/2006 & 222/2009

निर्धारण वर्ष /Assessment years : 2001-02, 2002-03 & 2000-01.

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| The Assistant Commissioner of Income Tax, Company Circle IV(4), Chennai | **Vs.** | M/s. Neyveli Lignite Corporation Ltd, Neyveli 607 801. |

[PAN AAACN 1121C]

ITA Nos. 782/2005 & 177/2009.
(Assessment years: Nil, 2001-2002)

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| M/s. Neyveli Lignite Corporation Ltd, Neyveli 607 801. | **Vs.** | The Assistant Commissioner of Income Tax, Company Circle IV(4) Chennai**.** |

[PAN AAACN 1121C]

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| **(अपीलार्थी/Appellant)** | **(प्रत्यर्थी/Respondent)** |

Department by : Shri. E.S. Nagendra Prasad, CIT, DR.

प्रत्यर्थी की ओर से /Respondent by : Shri. R. Vijayaraghavan, Advocate

सुनवाई की तारीख/Date of Hearing : 07-05-2015

घोषणा की तारीख /Date of Pronouncement : 26-06-2015

**आदेश / O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER**

The Department has filed appeals in ITA Nos. 222/09, 374/2004 and 529/06 and the assessee has filed appeals in ITA Nos.177/09 & 782/2005 are directed against different orders of the Commissioner of Income Tax (Appeals), Large Tax Payer Unit, Chennai. Since certain issues in these appeals are common in nature, these appeals are clubbed, heard together, and disposed of by this common order for the sake of convenience.

2. The first issue in ITA No.222/Mds/2009 for the assessment year 2000-2001 by Revenue is that the Commissioner of Income Tax (Appeals) erred in holding that the expenses incurred on Life Extension Program (LEP) of Thermal Power Station I (TIPS-I) and expenditure on Rejuvenation of Bucket Wheel extractors are allowable as revenue expenditure.

3. The facts of the case are that during the relevant assessment year the assessee had incurred expenditure of ₹80,27,307/- on rejuvenation of Bucket Wheel Excavtor (BWE) of Mines-I and LEP of TPS-I. According to the Assessing Officer, there was increase in

production capacity, he treated the same as Capital Expenditure. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

4. The Commissioner of Income Tax (Appeals) observed that there is no increase in production capacity, and he allowed the claim of the assessee as revenue expenditure. Against this, the Revenue is in appeal before us.

5. We have heard both the parties and perused the material available on record. In our opinion, this issue is squarely covered in assessee's own case in *ITA Nos.219, 220,221, 981, 982/Mds/*2009 and others, the Tribunal vide order dated 18.07.2012 observed that

> *14. We have heard both sides, considered the materials available on record and perused the orders of lower authorities and reliance placed on the case law by the counsels. The assessee is engaged in generation of electricity and mining of lignite installed power generation plants consisting of 9 units for generation of 600 MW power. During the assessment years 1993-94 to 99-2000, the assessee incurred the following expenditure towards replacement of various components in boilers and components of BWE under the LEP programme starting from the assessment year 1993-94 to 1999-2000 and the year-wise breakup for such expenditure is as under:*

| *Asst. years* | | *Amount (Rs)* |
|---|---|---|
| *1993-94* | : | *10,22,63,348/-* |
| *1994-95* | : | *39,35,07,774/-* |
| *1995-96* | : | *22,65,86,642/-* |
| *1996-97* | : | *27,78,53,677/-* |
| *1997-98* | : | *56,84,06,076/-* |
| *1998-99* | : | *48,23,92,595/-* |
| *1999-2000* | : | *47,35,92,595/-* |
| *Total* | : | *252,46,02,707/-* |

The assessee claims this expenditure as allowable deduction either under section 31(i) or under section 37 of the Income Tax Act. The Assessing Officer completed the assessment rejecting the claim of the assessee and treating the said expenditure as capital expenditure on the ground that the assessee has incurred huge expenditure on TPS-I under LEP and on rejuvenation of BWE and this expenditure brought enduring benefit to the assessee, especially there is increase in the production/power generation capacity of the assessee and therefore, is in the nature of capital. The contention of the Assessing Officer was that this is one time expenditure at the end of life span of the asset with a view to give new life. Therefore, the expenditure did not fall within the meaning of "current repairs" under section 31(i) of the Act. The Commissioner of Income Tax (Appeals) in his common order for the assessment years 1995-96 to 1997-98 elaborately dealt with various issues and the issue of increase in production capacity and came to the conclusion that there is no increase in production/power generation capacity and placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT vs. Saravana Spinning Mills P. Ltd. (supra) held that the expenditure was not incurred in the capital field and allowable as deduction. For better understanding the nature of expenditure incurred, it is necessary to reproduce the technical write-up of TPS-I of LEP at page 62 to 63 and Note on rejuvenation of BWE at page 76 of the paper books, which reads as under:

***"TPS-I: LEP – TECHNICAL WRITE UP***

*Electricity is generated from 600MW Thermal Power Station-I, Neyveli, having nine Units consisting of boilers, turbines, generators & transformers. The steam, generated in boiler drives steam turbine which coupled with generator generates electric power.*

*Neyveli Thermal Power Station-I (NTPS-I) has an installed capacity of 600MW consisting of six 50MW units and three 100 MW units. The 50 MW units have one boiler each and 100MW units have two boilers each. The entire equipments of 600MW had been supplied, erected and commissioned by M/s. Technoprornexport (TPE), Russia from 1962 to 1970 in three stages on turnkey basis.*

*During the year 1989, the Residual Life Assessment (RLA) studies in two units (units 1 & 9) were carried out by M/s TPE, Russia as approached by NLC since almost all the units had crossed 1.3 lakhs service hours and experiencing frequent failures in high pressure parts due to ageing. The Russian specialists conducted various tests and studied elaborately. Based on the study results, they recommended*

*for operation of the equipment with reduced steam parameters up to the end of 1991 and the possibility of further operation of the equipment at rated steam parameters only after replacement of the corresponding parts and groups.*

*The high pressure parts of boilers namely Super heaters and main steam line are subjected to creep damage due to reaching of service life of around 180000 running hours, and the water walls & economisers are subjected to corrosion and erosion. Other parts namely air heaters, ducts and auxiliary equipments like pulverised fuel burners, mills, draft fans etc. are subjected to corrosion erosion, wear and tear. Thus, the performance of boilers and safe operating life of critical pressure parts of the boiler got exhausted.*

*Considering the ageing of units and for safe operation of the equipments at rated steam parameters, the Life Extension Programme works in all units were carried out from April 1992 to March 1999 in phased manner with the approval of Govt. of India.*

*The components subjected to creep damage namely super heaters, main steam lines etc. and high pressure valves, economisers and other allied pipe lines lost their healthiness were replaced in full, where as other high pressures parts namely water walls & feed water lines and other parts, after inspection were partially replaced to the extent required.*

*Boilers*

*The following components were replaced completely in boilers:*

1. *Super heaters with their headers and inter connecting pipes.*
2. *Main steam line.*
3. *Upriser and Down comer pipes.*
4. *Economiser and their transfer-pipes.*
5. *Boiler condenser and de super heater.*
6. *High pressure valves.*
7. *Compensators of Air and Gas ducts.*
8. *Rear side water wall.*

*The following components were replaced partially after inspection;*

1. *Front water wall and side water walls.*
2. *Boiler drum internals.*
3. *Air heaters.*
4. *Feed water pipe line.*
5. *Boiler shield plates and hydraulic seal.*
6. *Lignite pulverizing system.*

*The following equipments were overhauled:*

1. *Induced and Forced draught fans.*
2. *Belt feeders*
3. *Slag conveyors.*
4. *Ash handling system.*

***Turbine, Generator and Transformer:***

*These major equipments were overhauled with the replacement of worn out parts.*

*Thus the works under LEP of the units of Thermal Power Station-I are comprised of full and partial replacement and overhaul/ repair of main equipments."*

***NOTE ON EXPENDITURE OF REJUVENATION OF BUCKET WHEEL EXCAVATOR (BWE) OF MINE-I CLAIMED AS REVENUE:***

*Rejuvenation of Bucket Wheel Excavator (BWE ) of Mine-I:*

*A brief write-up regarding the works carried out with details of expenditure under this furnished below:*

*The following critical items are replaced:*

*(i) Crawler Pads*
*(ii) All the six crawler frames with drives assemblies (for 3 tracks) including the mechanical components.*
*(iii) Traverse box of self-aligning track*
*(iv) Tower frame completes including pully mast*
*(v) Bucket wheel boom complete*
*(vi) Discharge Boom complete*
*(vii) Main slewing ball race and main slewing gear box shell*
*(viii) Bucket Wheel Boom hoist winch drum*
*(ix) All the host winch ropes*

*The following non-critical items are replaced:*

*(i) Secondary structures like walk way and stair case for under carriage, turn table, Bucket Wheel boom, discharge boom, intermediate boom and counter weight boom.*

*(ii) Motor foundation and Motor covers for all the drivers.*
*(iii) Cabin and houses.*

*The following components have been repaired:*

*(i) Steering tiller (FST and RST)*
*(ii) Under carriage*
*(iii) Turn table*
*(iv) Counter weight boom and Box*
*(v) Intermediate structure*

*It may be noted that Rejuvenation of Bucket Wheel Excavators involves repairs / replacement of certain critical worn out parts, none of the part is independent nature of working. All the replaced and repaired items are forming part of the single machine called Bucket wheel excavator and in that process the machine is brought to its original Condition and it does not result in a new asset. Diagrams showing the parts of the Bucket Wheel excavator is enclosed"*

15. It could be seen from the above technical write-ups, the whole exercise of the LEP of TPS-I and rejuvenation of BWE is for replacement of certain parts of boilers/BWE only. The assessee has not replaced the entire boiler/BWE and what was replaced was only the parts of boiler/BWE. These parts of the boiler/BWE are not capable of functioning independently and this fact is not in dispute. In our view, these expenditures were incurred only to replace certain parts of boiler/BWE and overhauling of the parts in boiler and is only to preserve and maintain the existing assets i.e. boiler/BWE and there is no enduring advantage obtained on replacement of such parts of existing assets. The assessee also demonstrated that there is no increase in production/ generation of power capacity and therefore, the observations of the Assessing Officer that there is increase in production capacity appears to be misplaced.

16. In the assessment order, the Assessing Officer himself stated that, if a new plant is to be installed, the cost of such new plant would be about ₹4.5 crores per MW and in such case the total project cost would come to ₹2700 crores for 600 MW. If that is the case, the expenditure incurred for the replacement of parts of machinery i.e. TPS-I/BWE in all these seven assessment years i.e. 1993-94 to 1999-2000 was about 252 crores and this is not even 10% of the total project cost.

17. Therefore, we should not go by the quantum of expenditure incurred by the assessee in deciding the issue of whether such expenditure is allowable as deduction as current repairs/revenue expenditure or such expenditure is a capital expenditure.

18. When the assessee is claiming the expenditure as allowable deduction under section 31(i) of the Act, what is to be seen is that by way of incurring the expenditure on replacement of parts of machinery, overhauling the machinery whether it was incurred to preserve and maintain an already existing asset or such expenditure was incurred to bring a new asset into existence or to obtain a new advantage. In this case, we see that the expenditure on replacement of parts of boiler/BWE was incurred only to preserve and maintain the existing assets and object of incurring such expenditure was not to bring a new asset into existence. The Hon'ble Allahabad High Court in the case of CIT v. Renu Sugar Power Co. Ltd. [298 ITR 94], almost on similar circumstances, following the decision of the Hon'ble Supreme Court in the case of CIT v. Saravana Spinning Mills (P) Ltd. (supra) held that the turbine rotor is a part of the Turbo Generator Set and expenditure incurred by the assessee on replacement of one turbine rotor on account of current repairs is allowable as revenue expenditure. The facts in this case are that the assessee is a captive power plant and had 2 thermal power plant of generating capacity with 67.5 MW each. The assessee claimed expenditure of `.1,05,44,904/- as the cost of the turbine rotor, which was disallowed by the Assessing Officer treating as capital expenditure. It was found by the Tribunal that the turbine rotor was an essential part of turbo generator set and it was not an independent machinery or plant. The turbine rotor of its own independent functioning could not generate electricity. Therefore, it was held that the assessee was entitled to deduction, which was affirmed by the Hon'ble Allahabad High Court. While affirming the order of the Tribunal, the Hon'ble Allahabad High Court observed as under:

*"We find that the controversy stands concluded by the judgement of this Court in the case of Commissioner of Income Tax Vs. Kanodia Cold Storage [1975]100 ITR 155 wherein it has been held as follows(headnote):*

> *"Replacement of worn out parts does not by itself bring in a new asset. In considering the nature of an expenditure one should consider the productive unit as a whole and not pick out parts therein which are new. If the productive unit to the assessee remains the same but a part of it which has become unsuitable for its use is replaced by something which makes it possible for the existing set up to function efficiently, the cost incurred on such replacement would be revenue expenditure."*
>
> *The Commissioner of Income-tax Vs. M/s. Saravana Spinning Mills Pvt. Ltd.[2007] 293 ITR 201(SC); [ 2007] 10 JT 111(SC),*

*while interpreting the words "current repairs" in Section 31 of the Income-tax Act, it has been held as follows (page 208):-*

*"..... If an autoleveler is to be repaired then that repair would come within the connotation of the word "current repairs" because it is a part of the Carding Machine. Even if in a given case, replacement of an Autoleveler could come within the connotation of the word "current repairs" if the old part is not available in the market. It is a "current repair" because the Carding Machine remains as an asset without any change even after repair or replacement of the autoleveler. To give an example, a Compressor in an important part of an Air-condition Machine. Repair of the Compressor will come in the connotation of the word "current repairs" in Section 31 (i) of the said Act because the assessee does not replace the Air-condition Machine. At the highest, he replaces a part of the Air-condition Machine. So is in the case of the picture tube in a Television Set, when the picture tube is replaced the Television Set is not replaced, therefore, such repairs alone can come within the connotation of the word "current repairs" in Section 31(i) of the said Act as it stood at the material time. They are effected to preserve and maintain the asset, viz. air-conditioner or carding machine.....*

*The basic test to find out as to what would constitute current repairs is that the expenditure must have been incurred to "preserve and maintain" an already existing asset, and the object of the expenditure must not be to bring a new asset into existence or to obtain a new advantage."*

*So far as the decision relied upon by the learned standing counsel for the department is concerned, the same is distinguishable on facts. In that case the question whether certain expenditure incurred by the assessee on knives and losses in the material period qualified for capital allowance under section 16(3) of the Finance Act, 1954. On facts it was found that the knives are not parts of the machine. Each knife is a separate tool or implement designed to be used in conjunction with the machine. On these facts it was held that replacement of knives was the capital expenditure. In the case on hand the factual position is quite different. It has been found by the Tribunal as a fact that Turbine Rotor is a part of Turbo Generator Set. The Turbine Rotor does not function independently. It is a part of Turbo Generator Set.*

*In view of the above discussion, we do not find any error in the order of the Tribunal. The Tribunal was justified in holding that theexpenditure by the assessee on the replacement of one Turbine Rotor amounting to `. 1,05,44,904/- was on account of current repairs and as such it was revenue expenditure."*

> 19. The case law relied on by the counsel for the Revenue in the cases of Bharat Gears Ltd. v. CIT [337 368 (Del.)], CIT v. Madura Coats 205 TAXMAN 357/19 (Mad), CIT v. M/s. Rane Brake Linings Ltd. T.C.(A) No. 71 & 72 of 2008 dated 25.04.2011, CIT vs. Universal Cold Storage Ltd. T.C.(A) No. 39 of 2008 dated 08.11.2011 are distinguishable on facts and the ratio of these decisions are not applicable to the facts of the assessee's case since in the assessee's case, what was replaced was only the parts of machinery and the expenditure was incurred only to preserve and maintain the existing assets and therefore, the expenditure on such repairs is allowable as deduction under current repairs. Hence the case law relied on by the Revenue are of no help. Therefore, following the decision of the Hon'ble Supreme Court in the case of CIT v. Saravana Spinning Mills P. Ltd. (supra), we sustain the order of the Commissioner of Income Tax (Appeals) in allowing the expenditure on replacement/overhauling of TPS-I/BWE as deduction. The grounds raised by the Revenue are dismissed on this issue for all the assessment years from 1993-94 to 1999-2000.

Thus, the Tribunal held that the expenditure is revenue in nature and allowed the claim of the assessee. Respectfully, following the above order of the Tribunal, we are inclined to dismiss this ground raised by the Revenue. Accordingly, this ground is dismissed.

6. The next common ground in ITA Nos.222/2009, 374/2004 and 529/2006 is that the Commissioner of Income Tax (Appeals) erred in holding that the assessee is entitled to 100% deduction u/s.80IA, as second year in respect of profits earned in the unit VII of TPS II - Stage II which was commissioned in the previous year 1994-1995.

7. The Commissioner of Income Tax (Appeals) allowed the claim of the assessee u/s.80IA by observing that the assessee has opted assessment year 1999-2000 as first year of commencement and in

view of provisions under section 80IA(2), the assessee is permitted to claim deduction for any ten years out of first fifteen years. Accordingly, the Commissioner of Income Tax (Appeals) allowed the claim of the assessee u/s.80IA by observing that the assessee claimed the deduction u/s.80IA in assessment year 1999-2000 as first year. Against this, the Revenue is in appeal before us.

8. We have heard both the parties and perused the material on record. The issue is squarely covered by the judgment of jurisdictional high court in the case of *Velayudhaswamy Spinning Mills (P) Ltd 340 ITR 477* wherein it was observed that

> *" from reading of sub-s (1) of s. 80IA, it is clear that it provides that where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-s (4) i.e. referred to as the eligible business, there shall, in accordance with and subject to the provisions of the sections, be allowed, in computing the total income of the assessee, a deduction of an amount equal to 100 per cent of the profits and gains derived from such business for ten consecutive assessment years. Deduction is given to eligible business and the same is defined in sub-s. (4). Sub-s(2) provides option to the assessee to choose 10 consecutive assessment years out of 15 years. Option has to be exercised. If it is not exercised, the assessee will not be getting the benefit. Fifteen years is outer limit and the same is beginning from the years in which the undertaking or the enterprise develops and begins to operate any infrastructure activity etc Sub-s. (5) deals with quantum of deduction for an eligible business. The words "initial assessment year" are used in sub-s (5) and the same is not defined under the provisions. It is to be noted that initial assessment year employed in sub-s (5) is different from the words "beginning from the year" referred to in sub-s(2). Important factors are to be noted in sub-s(5) and they are as under: (1)it starts with non obstante clause which means it overrides all the provisions of the Act and other provisions are to be ignored; (2) it is for the purpose of*

*determining the quantum of deduction; (3) for the assessment year immediately succeeding the initial assessment year ; (4) It is a deeming provision; (5) fiction created that the eligible business is the only source of income; and (6) during the previous year relevant to the initial assessment year and every subsequent assessment year. From reading of the above, it is clear that the eligible business were the only source of income, during the previous year relevant to initial assessment year and every subsequent assessment years. When the assessee exercises the option, the only losses of the years beginning from initial assessment year alone are to be brought forward and not losses of earlier years which were already set off against the income of the assessee. Looking forward to a period of ten years from the initial assessment contemplated. It does not all the Revenue to look backward and find out if there is any loss of earlier years and bring forward nationally even though the same were set off against other income of the assessee and the set off against the current income of the eligible business. Once the set off is taken place in earlier year against the other income of the assessee, the Revenue cannot rework the set off amount and bring it notionally. Fiction created in sub-s(5) does not contemplates to bring set off amount notionally. Fiction is created only for the limited purpose and the same cannot be extended beyond the purpose for which it is created. There is no dispute that losses incurred by the assessee were already set off and adjusted against the profits of the earlier years. During the relevant assessment year, the assessee exercised the option under S.80-IA(2). In Tax Case No.918 of 2008 the assessment year was 2004-05. During the relevant period, there were no unabsorbed depreciation or loss of the eligible undertakings and the same were already absorbed in the earlier years. There is a positive profit during the relevant year. Therefore, loss in the year earlier to initial assessment year already absorbed against the profit of other business cannot be notionally brought forward and set off against the profit of the eligible business as no such mandate is provided in S. 80-IA(5) – CIT vs. TTK Pharma Ltd (Tax Case (Appeal ) No.298 of 2004, dt. 23rd Dec., 2009) Followed; CIT vs. Mewar Oil & General Mills Ltd (2004) 186 CTR (Raj) 141; (2004) 271 ITR 311 (Raj) concurred with; Mohan Breweries & Distilleries Ltd vs. Asst. CIT (2008) 114 TTJ (Chennai) 532: (2008) 3 DTR (Chennai) (Trib) 477 affirmed".*

Being so, we are inclined to dismiss the appeal of the Revenue as the first year of claim of assessee was assessment year 1999-2000 and 80IA(2) permits the assessee to claim deduction for any ten years out of first fifteen years. This ground of the Revenue is dismissed**.**

9. The first ground in ITA No. 177/2009 filed by the assessee challenging the reopening of assessment.

10. The facts of the case are the assessee filed its return of income for the assessment year 2001-02 on 22.10.2001 showing a total income of ₹8,38,92,47,711/-. The case was taken up for scrutiny and other u/s.143(3) was passed on 28.3.2003. Notice u/s 148 was issued on 28.03.2007 to bring to tax income that has escaped from the assessment. The assessee vide letter dated 24.04.2005 submitted the return filed on 22.10.2001 may be treated the return filed instance to the notice u/s.148. The assessee filed a letter on 24.04.2005 requesting that the return furnished on 22.10.2001 may be treated as return filed in response to notice u/s.148. The assessee sought the reasons that had impelled the Assessing Officer to the conclusion that there has been escapement of income which ere vide communication dated 15.04.2007. The assessee submitted letter dated 20.06.2007 giving the submissions against the proposed reassessment on the ground that there has been no escapement of income. The jurisdiction to make reassessment was also questioned. Accordingly, the assessee prayed for dropping of the proceedings for reassessment. The Assessing Officer rejected the claim of the assessee and he treated the

expenditure towards purchaser of conveyor belts and accessories amounting to ₹70 crores as revenue expenditure and instead treating it as capital expenditure allowed depreciation at the rate of 25% thereon. Further, the Assessing Officer has also disallowed the claim of expenditure on account of purchase of loose tools as revenue expenditure and allowed depreciation at the rate of 25% thereon as claimed by the assessee in earlier years. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) confirmed the same**.**

11. The ld. Authorised Representative for assessee submitted that assessment was completed u/s.143(3) of the Act and was reopened for the purpose of considering the investment made towards purchase of conveyor belts and accessories claimed as revenue expenditure and also considered investment in loose tools claimed as revenue expenditure. According to the ld. Authorised Representative for assessee that the assessment was completed u/s.143(3) after calling for full particulars relevant to the assessment and the assessee had furnished all particulars necessary for the assessment. U/s.147 proviso the power to re-assess in a case where the assessment has

been made u/s.143(3), after the expiry of four years from the end of relevant assessment year is exercisable only if the income chargeable to tax has escaped assessment for such assessment year, by reason for the failure on the part of the assessee. According to the ld. Authorised Representative for assessee there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. According to him, the proviso of 147 will not apply and consequently the re-assessment cannot be initiated after a period of 4 years from the end of the assessment year. The ld. Authorised Representative for assessee submitted that the Assessing Officer raised three issues for reopening of assessment, which were duly considered by the Assessing Officer before framing assessment u/s.143(3) of the Act. He drew our attention to the letter of the Assessing Officer dated 21.11.2002 asking the assessee to furnish the details which is placed on record at paper book page No.9 in the course of original assessment. The ld. Authorised Representative for assessee submitted that the assessee furnished all the details vide its reply dated 7.12.2002. The Assessing Officer passed original assessment order u/s.143(3) of the Act dated 28.03.2003 after receiving all the details from the assessee. Hence, there cannot be any failure on the part of the assessee in furnishing all necessary

information required for the purpose of assessment. He relied on the following judgments:-

(1) CIT vs. Premier Mills, 296 ITR 157 (Mad)
(2) CIT vs. Elgi Finance, 286 ITR 674 (Mad)
(3) Mercury Travels Ltd vs. CIT, 258 ITR 533 (Cal)
(4) CIT vs. Indian Overseas Bank , 252 ITR 640 (Mad)
(5) CIT vs. Siva Traders, 255 ITR 77 (Ker)
(6) CIT vs Fenner India Ltd, 241 ITR 672 (Mad)
(7) CIT vs. Froamer France, 264 ITR 566 (SC)
(8) CIT vs. T.N. Transport Develop Fiance Corp. Ltd 306 ITR 136 (Mad).
(9) CIT vs. TVS Motor Co. Ltd 319, ITR 192 (Mad)
(10) SAK Industries P. Ltd vs. DCIT, 2012-TIOL-562-HC-DEL-IT
(11) Hindustan lever ltd vs. R.B. Wadekar, 268 ITR 332 Bom.
(12) Haryana Acrylic Mfg Co. vs. CIT, 308 ITR 38 (Del).
(13) CIT vs. A.V. Thomas exports ltd, 296 ITR 603 Mad.
(14) Well Intertrade P. Ltd vs. CIT, 308 ITR 22 (Del)
(15) Sitara Diamond P. Ltd vs. DCIT, 345 ITR 91 (Bom)
(16) Titanor Components Ltd vs. ACIT, 343 ITR 183 (Bom).

12. On the other hand, the ld. Departmental Representative submitted that assessee has not disclosed fully and truly the facts necessary for the assessment. Hence, reopening is valid in law. The most material part which was argued by the ld.AR is regarding the time lag which is provided in first proviso to section 147 which states that where an assessment u/s sub-section(3) of section 143 has been made for the relevant assessment year, which is 2001-02, in this case, no action shall be taken u/s 147 after the expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year by the reason of

the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. One has to see as to what 'failure of the assessee' to disclose fully and truly all material facts signify. It is true that 'every disclosure' is not and cannot be treated to be a true and full disclosure. A disclosure can be even false or true. It may be a full disclosure or it may not be a full one. A part disclosure many a times may be misleading one. What is required under the law is a full and true disclosure of all material facts necessary for making assessment for that year. This law was laid down by the Hon'ble Supreme Court in the case of *Sri Krishna Pvt. Ltd etc vs ITO & Others, 221 ITR 538*. The words 'omission or failure to disclose fully and truly all material facts necessary for assessment for that year postulates a failure of the assessee to disclose fully and truly all 'material facts necessary' for his assessment. What facts are 'material' and 'necessary' for assessment will differ from case to case. The material should not only be full but also be true. If some material found in the evidence produced before the Assessing Officer which the Assessing Officer could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the assessing authority. This omission or failure may be either deliberate, or even inadvertent, that is immaterial, but in case there is omission to disclose the material

facts then subject to the other conditions jurisdiction to reopen is attracted. Further, the ld. Departmental Representative relied on the judgment of Kerala High Court in the case of *CIT vs. Smt. R. Sunanda Bai 344 ITR 271* wherein it was held that suppression of facts, the Assessing Officer is at liberty to reopen the assessment though assessment was completed u/s143(3) of the Act. The ld. Departmental Representative also relied on the judgment of High Court of Rajasthan in the case of *Pushtikar Laghu Vyaparik Pratishthan Bachat Evam Sakh Sahkari Samiti Ltd vs. Union of India, 249 CTR 73 (Raj*). Further, he relied on the order of the Tribunal in the case of *M/s. MRF Ltd vs. DCIT in ITA Nos. 1374 to 1377/Mds/2010 for the assessment years 2002-03, 2004-05, 2006-07 & 2007-09*, dated 11.03.2011.

13. We have heard both the parties and perused the material on record. In this case, the contention of the assessee counsel is that the notice for re-assessment has been issued beyond four years from the end of the relevant assessment year and because the assessee had provided all material facts in the returns filed, the revision done only on the basis of some facts without the availability of fresh material would amount to change of opinion which cannot be made a ground for reopening. After arguing on the reasons recorded for the

reopening, to substantiate he placed reliance on some decisions which are kept on record. On the other hand, the ld. Departmental Representative has supported the appellate findings and has also placed reliance on some decisions in favour of the Revenue. In this case assessment was reopened by recording the reason as follows:-

> *(i) During the assessment year 2001-02, the assessee had purchased a conveyor belts and accessories worth of ₹70 crores and this was included in the cost of spares claimed and claimed as revenue expenditure. Since the conveyor belts used by the assessee are to be treated as general plant and machinery and depreciation is to be allowed at 25% as against revenue expenditure claimed by assessee.*
>
> *(ii) During the assessment year 2001-02, assessee has purchased loose tools and claimed depreciation @ 100%. Till previous year assessee claimed depreciation on loose tools at 25%. But the assessee has claimed the current purchase of loose and WDV of loose tools as revenue expenditure. Since the tools form part of machinery and deprecation has to be allowed at 25% only.*
>
> *(iii) It was noticed from the Deprecation statement, that the assessee has included lease hold buildings transferred from HUDCO, under the head Buildings and has claimed deprecation at the rate of 10% u/s.32. Since the assessee company is only lessee of the property depreciation claimed on leased property has to be withdrawn.''*

It is a settled law that on the basis of material, prima facie, available before the Assessing Officer, opined that income chargeable to tax has escaped assessment can be formed. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. In case the Assessing Officer has a cause or justification to know or suppose that income has escaped assessment , action u/s 148 can be taken. But

obviously, there should be relevant material on which a reasonable man could have formed a requisite belief. Whether this material(s) would conclusively prove the escapement of income is not the concern at that particular stage. So what is required is the subjective satisfaction of the Assessing Officer based on objective material evidence. In the given case, assessment was completed on 28.03.2003. The reason was recorded as discussed above. The argument of the ld.AR is that u/s 147 in case the assessment order is completed u/s 143(3), as has been done in this case, no action could be taken after the expiry of four years from the end of the relevant assessment year unless the assessee has disclosed fully and truly all material facts necessary for the assessment for that assessment year, inter alia.

14. As seen from the reasons recorded, give a clear picture that the Assessing Officer has got material evidence to form his opinion for taking recourse to section 147 r.w.s 148 of the Act. There cannot be two opinions. The point of time when the reasons are recorded after forming opinion of 'escapement of income' is only relevant. Hence, this plea of the ld.AR is not tenable in the eyes of law. It is true that u/s 147, the Assessing Officer can either assess or re-assess but for taking

action thereunder, he has to record reasons that income chargeable to tax has escaped assessment . It is also mandated by section 148(2) to record reasons in writing. The reassessment proceedings u/s 147 are further subject to sections 148,149,150,151,152 and 153. But in the present case, we are required to decide the limited issue regarding the validity of proceedings undertaken after four years of the assessment year in question. The Assessing Officer is required to see if the conditions laid in Explanation 2(c) because in this case the assessment was completed u/s 143(3) are satisfied or not. In case, (i) income chargeable to tax has been under assessed; or (ii) such income has been assessed at too low rate; or(iii) such income has been made the subjective of excess relief under this Act; or (iv)excessive loss or depreciation allowance or any other allowance under this Act has been computed, the Assessing Officer would have valid cognizance u/s 147 of the Act. The reasons recorded by the Assessing Officer clearly speak for the under assessment of tax hence, the conditions laid above stand fulfilled in so far as re-assessment proceedings are concerned. In so far as the reasons recorded, extracted in the above portion of this order, we are satisfied that the Assessing Officer has 'reason to believe' that income has escaped assessment. This fact confers jurisdiction on him to reopen the assessment. The power to re-assess

post 1st April, 1989 are much wider than these used to be before. But still the schematic interpretation of the words 'reason to believe' failing which section 147 would give arbitrarily powers to the Assessing Officer to reopen the assessment on the basis of mere change of opinion, which cannot be, per se a reason to reopen the case. The Act has not given power to the Assessing Officer to review but has only given power to re-assess. There is a conceptual difference between the two aspects as the Assessing Officer has no power at all to review the assessment. The reassessment, as stated above, has to be based on fulfillment of certain pre-conditions but the concept 'change of opinion' has to be taken into consideration otherwise it may give unbridled power to an Assessing Officer to reopen any and every assessment order which would simply amount to a review. The concept 'change of opinion' is an in-built test to check the abuse of power by the Assessing Officer. So, now only when the Assessing Officer has a tangible material to base his conclusion that there is an escapement of income from assessment and the reasons recorded have a link with the formation of his belief, he has the power u/s 147 of the Act.

15. Now the most material part which was argued by the ld.AR is regarding the time lag which is provided in first proviso to section 147 which states that where an assessment u/s sub-section(3) of section 143 has been made for the relevant assessment year, which is 2002-03, in this case, no action shall be taken u/s 147 after the expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year by the reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. There are two other conditions which are not relevant for deciding the legal issue under appeal. We have to see as to what 'failure of the assessee' to disclose fully and truly all material facts signify. The expression 'failure to disclose material facts' has been explained in the Taxman's Direct Taxes Manual Volume 3. It is true that 'every disclosure' is not and cannot be treated to be a true and full disclosure. A disclosure can be even false or true. It may be a full disclosure or it may not be a full one. A part disclosure many a times may be misleading one. What is required under the law is a full and true disclosure of all material facts necessary for making assessment for that year. This law was laid down by the Hon'ble Supreme Court in the case of *Sri Krishna Pvt. Ltd etc vs*

*ITO & Others, 221 ITR 538.* The words 'omission or failure to disclose fully and truly all material facts necessary for assessment for that year postulates a failure of the assessee to disclose fully and truly all 'material facts necessary' for his assessment. What facts are 'material' and 'necessary' for assessment will differ from case to case. The material should not only be full but also be true. If some material found in the evidence produced before the Assessing Officer which the Assessing Officer could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the assessing authority. This omission or failure may be either deliberate, or even inadvertent, that is immaterial, but in case there is omission to disclose the material facts then subject to the other conditions jurisdiction to reopen is attracted.

16. In the present case, the assessee has been claimed expenditure incurred on loose tools as capital expenditure and claiming deprecation at 25% in earlier years. Suddenly during the assessment year under consideration the assessee changed its policy and claimed it as revenue expenditure without any reason. In our opinion, the assessee cannot change the accounting policy suddenly and that reason for change of accounting policy has not brought to the notice of the

Assessing Officer. Further, it is also to be noted that situation which warrant change of accounting policy is not substantiated. As per Explanation 2 of Section147 it is very clear that due to excessive claim of the assessee, the income chargeable to tax had escaped assessment. The assessee has not produced anything before the Commissioner of Income Tax (Appeals) to show as to how this fact was fully and truly disclosed before the assessing authority and that there was not failure on the part of assessee, especially when it has been claiming it as part of plant & machinery and suddenly it decides to claim it as revenue expenditure. Hence, the Commissioner of Income Tax (Appeals) considered the action of the Assessing Officer is fully covered by the provisions of Explanation 1 to Section 147 of the Income Tax Act which reads as under:

> *"Production before the Assessing Officer of accounts books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount* to disclosure within the meaning of the foregoing proviso".

It is possible that with due diligence the Assessing Officer would have ascertained this fat at the time of original assessment also, but in view of the explanation (1) it does not mean that there was no default on the part of the assessee. Hence, reopening u/s.147 is held to be valid. The assessee has tried to take shelter under the exception provided by

the above stated proviso where an assessment under sub-section (3) of section 143 has been completed, no action after the expiry of four years from the end of the assessment year can be taken. But as stated above, when the assessee has not disclosed fully and truly the facts necessary for the assessment , this proviso will not come to its rescue. Same is applicable to other reasons records for reopening of assessment. Consequently, we hold that the entire reassessment proceeding in this case is valid and therefore, the action of the Assessing Officer is upheld. The assessee fails on this legal issue.

17. The second ground in ITA No. 177/Mds/2009 appeal is that Commissioner of Income Tax (Appeals) ought to have appreciated that loose tools would only partake of the character of consumables in regard to an assessee comparable to the assessee.

17.1 We have heard both the parties and perused the material available on record. In this case, the assessee has been claiming loose tools as capital expenditure and claiming deprecation at 25%. Suddenly in the assessment year under consideration there was a change in the accounting policy without any reason. Even before us, the assessee was not able to furnish any reason for change in accounting policy. In the case of *Gujarat Small Scale Industries*

*Corporation Ltd vs. CIT 142 ITR 35(Gujarat HC)*, wherein held that the Tribunal perfectly justified in taking the view that the jigs and fixtures were part of the plant and machinery. The deduction was claimed on the ground that the tools, jigs and fixtures were losing their utility fast. It, therefore, amounted to a claim for depreciation. The rate of deprecation could not be claimed as fixed by the assessee's expert. It could be claimed only at the prescribed rate, i.e. at the general rate of 10%. The Tribunal was justified in disallowing the claim of the assessee. The Commissioner of Income Tax(A) in this case followed the above judgment. Being so, we do not find any infirmity in the order of the Commissioner of Income Tax (Appeals). This ground of the assessee is rejected.

18 The next ground in ITA No.782/2005 is with regard failure to deduct tax at source on payments made under the supply contract.

19 The facts of the case relates to the jurisdiction of the Income Tax Officer, TDS Ward-I, Cuddalore (TDS authority) in passing the impugned order. The assessee has stated that the TDS authority had considered the issue of deductibility of tax at source in respect of payments made to Ansaldo flowing from all the four contracts mentioned above while passing the order dated 24.12.2004 u/s.201

of Income Tax Act. According to the assessee, since the TDS authority had already applied his mind to all the four contracts as far as the issue of TDS was concerned, he could not have reopening the issue again and count not have passed the impugned order dated 18.02.2005. It has also stated that there was no provision for reopening the TDS proceedings under Chapter XVII of Income Tax Act similar to Sections 147/148 in respect of assessment proceedings. According to the assessee at the best the TDS authority could have restored to section 154 for rectification of mistake, if Asst. Year in the order dated 24.12.2004. The TDS authority in his order, however, has mentioned that the order dated 24.12.2004 was confined only to payments emanating from Contract No.II and the reference to all other contracts namely Contract No.I, Contract No.III and Contact No.IV was only by way of preamble for the purpose of setting forth the complete facts of the case. He has also stated that the concept of estoppels was not applicable to Income Tax proceedings. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

20 The Commissioner of Income Tax (Appeals) observed that he agree with the TDS authority that the order dated 24.12.2004 related

only to the payments emanating from Contract No.II and reference to all other Contracts including Contract No.I was only to bring out complete facts of the case on record. The provisions of Sec.195 are applicable to each payment made to the non non-residents. Sec.154 would have been applicable only if there was a mistake in order dated 24.12.2004 of the TDS authority inspect of same payments (i.e relating to Contract No.II). However, the impugned order relates to payments emanating from Contract No.I. Since there was no order in relation to payments made under Contract No.I, the question of rectification or reopening or revisiting of ''earlier order" does not arise. Therefore , the he do not find any merit in the assessee's argument that the TDS authority lacked jurisdiction in passing the impugned order. Against this, the assessee preferred an appeal before us**.**

21 We have heard both the parties and perused the material on record. The ld. Authorised Representative for assessee observed that levy of interest u/s.201(1A) depends on the income computed in the case of recipient as well as date of filing of the return of the recipient. It was brought to our notice that the appeal of the assessee for determining the income accruing in India is pending

before appellate authorities/court. In view of this, we remit this issue back to the file of the Assessing Officer to re-compute the interest u/s.201(1A) after verifying the return of recipient and also in the light of judgment of Supreme Court in the case of *CIT vs. Hindustan Coca-cola Beverages (P) Ltd, 293 ITR 226 (SC),* wherein held that where the payee has already paid tax on the income on which there was a short deduction of tax at source, recovery of tax cannot be made once again from the tax deductor. This issue is remitted back to the file of Assessing Officer for fresh consideration.

22 In the result, the Revenue's appeals in ITA Nos.374/2004, 529/2006 & 222/2009 and assessee's appeal in ITA No.177/2009 are dismissed and the assessee's appeal in ITA No.782/2005 is partly allowed for statistical purposes.

Order pronounced on Friday, the 26th day of June, 2015, at Chennai.

Sd/-

**(एन.आर.एस. गणेशन))**
(N.R.S. GANESAN)
**न्यायिक सदस्य**/JUDICIAL MEMBER

Sd/-

**(चंद्र पूजारी )**
(CHANDRA POOJARI)
**लेखा सदस्य**/ ACCOUNTANT MEMBER

चेन्नई/Chennai.
दिनांक/Dated:26.06.2015.
**KV**
आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant 2.प्रत्यर्थी/ Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.